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Supreme Court Amends Rules on Publication of Court of Appeal Opinions

Court modifies presumption and bases for publication of opinions

San Francisco—The Supreme Court today announced amendments to the rules on publication of Court of Appeal opinions designed to encourage the publication of all appellate opinions that may assist in the reasoned and orderly development of the law and to improve public confidence in the publication process.

The state Constitution grants the Supreme Court authority to determine which opinions of the Courts of Appeal are published. (Cal. Const., Art. VI, § 14.) Generally only opinions certified for publication may be cited in the state courts. The court first established standards for publication of appellate opinions in 1964, adopting Rule 976¹ of the California Rules of Court.

The rule has been studied and amended several times since its initial adoption, and the most recent review was aimed at analyzing publication practices in order to determine whether they meet the goal of providing adequate and appropriate guidance to the bar and the public.

The newly adopted amendments, effective April 1, 2007, will:

- State that an opinion *should* be published if the opinion meets one or more of the criteria specified in the rule, replacing the current presumption against publication of an opinion unless it meets the criteria specified in the rule;

¹ Effective January 1, 2007, rule 976 will be renumbered as rule 8.1105.

- Specify that the rule applies to every opinion, whether it affirms or reverses a lower court opinion;
- Clarify and expand the criteria that the Courts of Appeal should consider when deciding whether to certify an opinion for publication; and
- Identify factors that should *not* be considered in deciding whether to certify an opinion for publication, such as court workload or embarrassment to attorneys, litigants, judges or others.

The Supreme Court adopted these amendments based on the final report and recommendations of its Advisory Committee on Rules for Publication of Court of Appeal opinions. This 13-member committee, chaired by Supreme Court Justice Kathryn Mickle Werdegar, was charged with reviewing the current standards provided by Rule 976 to guide the Courts of Appeal in determining which opinions should be certified for publication and with making recommendations to the Supreme Court on what changes, if any, should be instituted to better ensure that appropriate opinions are published.

The advisory committee's final report was the culmination of two years of work, which included reviewing practices in other jurisdictions, analyzing statistical information on the publication rates of the California Courts of Appeal, and surveying the justices of the Courts of Appeal and appellate and other attorneys concerning the current criteria for publication in rule 976 and the courts' publication practices.

In 2005, the committee solicited public comments on its preliminary report and recommendations, which proposed more limited amendments than those contained in the final report. Based on the public comments received, the committee substantially revised its proposal for amending rule 976 and, earlier this year, sought additional public comment on this revised recommendation.

The committee's final report reflects all of the public input received, as well as the committee's extensive research and analysis. In addition to the amendments to rule 976 adopted by the court, the committee's final report recommends monitoring the impact of these rule amendments, providing judicial education on the publication rules and practices, and further evaluating other potential changes to the publication rules. As stated in the report, the committee believes that implementing these recommendations:

“will clarify the criteria for publication for both justices and attorneys, better ensure the publication of all those opinions that may assist in the reasoned and orderly development of the law, and improve public confidence in the publication process.”

The committee’s final report, including extensive background information considered by the committee in forming its recommendations and charts summarizing the public comments and the committee’s responses, is available online at: <http://www.courtinfo.ca.gov/courts/supreme/comm/#opin>.

A copy of the amended rule is attached, as is a list showing the members of the committee.

A hard copy of the report may be requested by contacting Mr. Clifford Alumno at:

Administrative Office of the Courts
Office of the General Counsel
455 Golden Gate Avenue
San Francisco, California 94102

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Rule 8.1105 of the California Rules of Court would be amended, effective April 1, 2007, to read:

1 **Rule 8.1105. Publication of appellate opinions**

2
3 **(a)-(b) * * ***

4
5 **(c) Standards for certification**

6
7 ~~No~~ An opinion of a Court of Appeal or a superior court appellate division -
8 whether it affirms or reverses a trial court order or judgment - ~~may~~ should
9 be certified for publication in the Official Reports ~~unless~~ if the opinion:

10
11 (1) Establishes a new rule of law;_;

12
13 (2) Applies an existing rule of law to a set of facts significantly different
14 from those stated in published opinions;_;~~or~~

15
16 (3) Modifies, explains, or criticizes with reasons given, an existing rule of
17 law;

18
19 (4) Advances a new interpretation, clarification, criticism, or construction
20 of a provision of a constitution, statute, ordinance, or court rule;

21
22 ~~(2)(5)~~ Resolves Addresses or creates an apparent conflict in the law;

23
24 ~~(3)(6)~~ Involves a legal issue of continuing public interest; ~~or~~

25
26 ~~(4)(7)~~ Makes a significant contribution to legal literature by reviewing either
27 the development of a common law rule or the legislative or judicial history
28 of a provision of a constitution, statute, or other written law;_;

29
30 (8) Invokes a previously overlooked rule of law, or reaffirms a principle of
31 law not applied in a recently reported decision; or

32
33 (9) Is accompanied by a separate opinion concurring or dissenting on a
34 legal issue, and publication of the majority and separate opinions would
35 make a significant contribution to the development of the law.
36

1 **(d) Factors not to be considered**

2
3 Factors such as the workload of the court, or the potential embarrassment of
4 a litigant, lawyer, judge, or other person should not affect the determination
5 of whether to publish an opinion.
6

7 **(d)(e) Changes in publication status**

- 8
9 (1) Unless otherwise ordered under (2), an opinion is no longer considered
10 published if the Supreme Court grants review or the rendering court
11 grants rehearing.
12
13 (2) The Supreme Court may order that an opinion certified for publication
14 is not to be published or that an opinion not certified is to be published.
15 The Supreme Court may also order publication of an opinion, in whole
16 or in part, at any time after granting review.
17

18 **(e)(f) Editing**

- 19
20 (1) Computer versions of all opinions of the Supreme Court and Courts of
21 Appeal must be provided to the Reporter of Decisions on the day of
22 filing. Opinions of superior court appellate divisions certified for
23 publication must be provided as prescribed in rule 8.707.
24
25 (2) The Reporter of Decisions must edit opinions for publication as
26 directed by the Supreme Court. The Reporter of Decisions must submit
27 edited opinions to the courts for examination, correction, and approval
28 before finalization for the Official Reports.
29
30

California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Chair

Hon. Kathryn Mickle Werdegar, Associate Justice, California Supreme Court

Members

Hon. Joanne Parrilli, Associate Justice of the California Court of Appeal, First Appellate District, Division Three

Hon. Kathryn Doi Todd, Associate Justice of the California Court of Appeal, Second Appellate District, Division Two

Hon. Fred K. Morrison, Associate Justice of the California Court of Appeal, Third Appellate District, Division One

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Mr. Dennis A. Fischer, Law Offices of Dennis A. Fischer

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Mr. Ellis J. Horvitz, Horvitz & Levy

Ms. Beth J. Jay, Principal Attorney to the Chief Justice, California Supreme Court

Mr. Edward Jessen, Reporter of Decisions, California Supreme Court

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